532, 559, 602, 634, 1865)) Nor was Shekoyan a "U.S. diplomat." As the district court observed, the copy of a "Service Card" he submitted does not come close to establishing that he worked for the State Department or was an official representative and envoy of the United States government.[5] (App. 890 (Rec. 2169 n.2)) Indeed, Sibley's contract with USAID expressly provided USAID "shall *not* exercise any supervision or control over the contractor's employees performing services under this contract. Such employees shall *not* be accountable to the government, but solely the contractor, who in turn is responsible to the Government." (Rec. 518 (emphasis added))

As the job required, Shekoyan moved to the Republic of Georgia, where he lived and worked until October 31, 1999, when Sibley's 1997 Task Order for the GEAR project ended. (App. 184, App.Ex. 267-68 (Rec. 53b, 237, 448-49, 470-71, 612)) Shekoyan received all of the compensation to which he was entitled under his employment agreement. (App. 267-69 (Rec. 448-50, 470-72))

As of November 1, 1999, USAID and Sibley entered into a new contract for further work in Georgia. (App. 268-69 (Rec. 449-50, 617-34)) This new work differed in focus and purpose. (*Compare* Rec. 621-24 (1999 contract tasks/work requirements) and 546-55 (1997 contract tasks/work requirements)) Accordingly, the staffing requirements under the new contract differed substantially, and a

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[5] Shekoyan also cited to the Vienna Convention [App. 417-26 (Rec. 1683-92)], but made no showing the United States (the purported "sending state") gave due notification to the Republic of Georgia (the purported "receiving state") and then "accredited" the "head of mission" and "assign[ed] any member of the diplomatic staff" – as required under the Convention [App.Ex. 418 (Rec. 1684)].

number of positions that existed under the 1997 contract did not exist under the 1999 contract, including the Training Advisor position Shekoyan had filled. (App. 269 (Rec. 450) and *compare* Rec. 629 (1999 contract) and 559 (1997 contract staffing)) There were only two long-term contract positions available under the new contract, for Project Manager and an Accountant II. (Rec. 629) Both required extensive experience and a CPA [Rec. 469, 559], which Shekoyan admittedly did not have [App.Ex. 77, 136-37 (Rec. 856, 948-49), 1362-63; *compare* App.Ex. 187-88 (Rec. 999-1000) (Reynolds' qualifications)].

II. NEARLY ONE YEAR AFTER HIS EMPLOYMENT ENDS, PETITIONER FILES SUIT FOR "WRONGFUL TERMINATION"; THE DISTRICT COURT VARIOUSLY DISMISSES AND GRANTS SUMMARY JUDGMENT ON HIS ARRAY OF CLAIMS

Nearly one year after his employment with Sibley ended, Shekoyan filed this lawsuit on October 20, 2000, claiming he was discriminated against on the basis of his Armenian ethnicity and wrongfully discharged in violation of Title VII, the "whistle-blower" provisions of the False Claims Act, and the District of Columbia Human Rights Act, and wronged by other conduct under a variety of common law theories. (App. 1-18)

Sibley moved to dismiss Shekoyan's Title VII claim on the ground the statute's extraterritorial application extends – as it states – only to United States citizens, and Shekoyan did not allege, and could not allege, that he was a United States citizen when he worked for Sibley in the Republic of Georgia. (App. 46-48) Sibley also moved to dismiss his False Claims Act claim on the ground he had not adequately alleged all the requisite

elements [App. 48-51], and to dismiss his local and common law claims on the ground that, in the absence of any viable federal claim, the district court lacked supplemental jurisdiction [App. 51].

Shekoyan filed extensive opposition. (App. 53-91) He admitted he was not "a citizen of the United States" when he worked for Sibley in the Republic of Georgia [App. 3, 53], but argued Sibley had essentially classified him in its contract as a "United States national" and "nationals" should be covered extraterritorially under Title VII [App. 59-78]. He also argued he had sufficiently alleged a claim under the False Claims Act and asked for leave to amend. (App. 78-84)

In a published memorandum decision filed August 18, 2002 (217 F. Supp. 2d at 59), the district court dismissed Shekoyan's Title VII claim [*id.* at 64-69], but allowed him to file an amended complaint augmenting his False Claims Act allegations [*id.* at 74-75]. Accordingly, the court also retained jurisdiction over his District of Columbia and common law claims [*id.* at 75-76]. On September 2, 2002, Shekoyan filed a first amended complaint. (App. 135A-59) Sibley answered, denied Shekoyan's claims of wrongdoing and asserted a counterclaim for the value of GEAR property that had not been accounted for during his employment. (App. 196-208)

Following discovery, Sibley moved for summary judgment on Shekoyan's remaining claims. (App. 223-270 (Rec. 401-640, 452-640)) With respect to his False Claims Act claim, Sibley demonstrated there was no evidence raising a triable issue that Shekoyan had engaged in "protected activity" or that he had been discriminated against because of such activity. (App. 240-50) Not only was there no evidence Shekoyan had undertaken to expose any fraud by Sibley in connection with its contract with

USAID, but he categorically denied in his deposition that he had ever believed there was any fraud: "I have never concluded there was corruption. I thought there are some issues that need to be kind of addressed or corrected or fixed or I don't know, worked out, but I did not conclude that there was corruption." (Rec. 596) Thus, even according to Shekoyan, the most he had done was raise internal concerns about some operational matters so Sibley personnel could take a look at them and modify or change them if appropriate. (Rec. 594-96)

Shekoyan filed extensive opposition, much of it directed to his claim under District of Columbia law that he had been harassed on the basis of his Armenian ethnicity. (App. 278-390, App.Ex. 1-386) According to Shekoyan, in the spring of 1999 he had temporarily filled in as Project Manager, and in mid-June 1999, was replaced by Jack Reynolds. (App.Ex. 14-15) He claimed Reynolds belittled and harassed him, creating a "hostile work environment." (App.Ex. 15-16) He also claimed he complained about Reynolds to Sibley personnel in Washington, D.C., but was told to try to work out the problems locally. (App.Ex. 16) He further claimed he told Sibley personnel in Washington, D.C., about concerns he had about how the GEAR project was being run, but was told not to "make too much noise." (App.Ex. 110) Approximately three months after Reynolds took over as Project Manager, and one month before the 1997 Task Order expired, Shekoyan was told he would not receive a new employment contract when his current contract ended. (Rec. 612)

Shekoyan purported to substantiate his claims with an unnotorized affidavit by his attorney recounting the supposed substance of telephone "interviews" with two former Sibley employees [App.Ex. 281-89], a "draft"

declaration one of the former employees supposedly was going to sign [App.Ex. 225-32], and exhibits and testimony that did not support the propositions for which they were cited [Rec. 1345-59]. Sibley moved to strike the improper submissions and recover its costs under Fed. R. Civ. P. 56(g). (App. 501-33 (Rec. 1326-74)) It also submitted signed and sworn declarations by the former Sibley employees. (Rec. 1361-71) Both stated Shekoyan's lawyer had made serious misstatements about her conversations with them and that they had not, and could not, substantiate any of Shekoyan's claims of harassment and discrimination. (*Id.*) Indeed, one of the declarants, David Bose, who had been Sibley's chief financial officer, felt pressured by Shekoyan's lawyer and told her several times he had no recollection of Shekoyan ever complaining about discriminatory treatment while he was employed by Sibley. (Rec. 1369) Bose was confident he would have remembered any such complaints since he, too, is a person of color. (*Id.*[6])

The other declarant, Gary Vanderhoof, who had been Sibley's vice-president and to whom Shekoyan claimed to have reported concerns about the GEAR program, stated all he could recall was an incident between Reynolds and Shekoyan just days prior to the expiration of Shekoyan's employment contract. (Rec. 1364) Reynolds had demanded to know about the handling of two televisions and a VCR, and reported Shekoyan had been insubordinate about responding. (*Id.*; *see also* Rec. 464-65, 476, 797, 1128-29)

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[6] Without telling Bose, Shekoyan's lawyer had taped their conversation. (Rec. 1457 n.2) When Shekoyan finally produced a copy of the tape to Sibley, there were a number of "gaps," and despite Shekoyan's lawyer's protests to the contrary, even the extant portions of the tape confirmed that her recitation of the conversation was incorrect in numerous respects. (Rec. 1457 n.2, 1459-64)

Shekoyan called Vanderhoof and also sent an e-mail, disputing that he had been insubordinate and claiming he had timely and thoroughly responded. (Rec. 1128-32) As a result of this incident, Reynolds told Shekoyan to leave the office and not return for the few remaining days of his contract. (Rec. 466-67, 470-71, 476) In short, what the *admissible evidence* from the former Sibley employees and current employees showed was that it was not until the final month of Shekoyan's employment, after he had been told he would not receive a new employment contract, that he began complaining of any unfair treatment by Reynolds.

The district court, in a detailed, 15-page order, granted in part Sibley's motion to strike Shekoyan's improper submissions and denied Shekoyan's counter-Rule 11 motion (Rec. 1978-2031) for sanctions. (App. 1152-68)

In the meantime, Shekoyan filed a voluminous motion to "amend" the district court's prior memorandum opinion dismissing his Title VII claim. (App. 598-710, App.Ex. 387-558, 565-67) In this motion, Shekoyan expounded on his claim that he was a "United States national" and as such should have been covered under Title VII. Alternatively, he argued the court should apply a "center of gravity" standard and under it, he should be considered to have been employed "within" the United States. (App. 613-23) In another order thoroughly discussing the limited extra-territorial application of the statute, the district court denied Shekoyan's motion. (App. 887-95) Shekoyan promptly filed a motion "to vacate" the court's order refusing to amend its Title VII ruling [App. 1010-15], which the district court denied [App. 1131-32]. He also filed a 29-page motion "for oral argument," again taking issue with the district court's order denying his motion to

"amend" the Title VII ruling [App. 907-1034], which the court also denied [App. 1149]. Undeterred, Shekoyan next filed a motion for leave to "file for summary judgment out of time" [App. 1016-21], based on a 64-page "second supplemental statement of undisputed facts" [App. 1064-127]. Given that the court already had twice extended discovery [Rec. 372, 380], and nine months had passed since the extended period had closed and the deadline for filing dispositive motions had lapsed [Rec. 380], the district court also denied this motion. (App. 1151-52)

On March 19, 2004, in a second published memorandum opinion (309 F. Supp. 2d at 9), the district court granted summary judgment for Sibley on Shekoyan's "whistle-blower" claim and dismissed his remaining local and common law claims. (App. 1179-2000) While acknowledging the FCA must be applied broadly to protect employees who report the misuse of government funds, the court explained there still must be a reasonable connection between the employee's conduct and the Act. Otherwise, any suggestion made or question raised by an employee about the implementation of a government funded program could give rise to a False Claims Act claim, which is not the intent or purpose of the statute. (App. 1188-95) The admissible evidence in this case, including Shekoyan's own admissions, established no more than that he had raised several concerns internally so. Sibley personnel could look into them. (App. 1991-95) The district court entered final judgment on March 19, 2004. (App. 1201-02) The Circuit Court of Appeals affirmed in a published opinion filed June 3, 2005 [409 F.3d at 414].

REASONS FOR DENYING THE PETITION

Shekoyan argues the pivotal issue in this case is whether he was a "U.S. National" when he worked for Sibley in the Republic of Georgia. Indeed, he claims this issue is one of overarching importance not just for Title VII purposes, but also for immigration, tort and criminal law generally. (Pet. Questions A, B and C) However, as the district court and Circuit Court of Appeals explained, that is not the dispositive issue in this case. Rather, the issues with respect to Shekoyan's Title VII claim are: (a) whether Title VII applies extraterritorially only to "a citizen of the United States" and (b) if Shekoyan was not a citizen of the United States, whether his employment was "in" the United States. In answering "yes" to the first question and "no" to the second, and thus concluding Title VII did not apply to Shekoyan's overseas employment, the district court and Circuit Court of Appeals applied the plain language of the statute and reached a result consistent with every other case applying the relevant statutory language. 409 F.3d at 420-22. Accordingly, there is no need for this Court to take up these issues.

Shekoyan claims the issue with respect to his "whistle-blower" claim is whether suspected fraud must be reported to a government agency, rather than to an employer. (Pet. Question D) Again, that is not the issue presented by this case. The lower courts did not hold an employee must report suspected fraud to a government official. Rather, they ruled that on this record there was no triable issue of material fact that Shekoyan engaged in protected activity – because he admitted he did not believe any fraud or corruption had occurred and had brought his concerns to the attention of Sibley officials so they could look into them. Again consistent with all prior case law, the district

court and Circuit Court of Appeals held this was insufficient to raise a triable issue under the FCA. 409 F.3d at 422-23.

Finally, Shekoyan claims this Court should revisit the abuse of discretion standard (Pet. Question E) to determine whether there must be an "independent analysis" of the facts and the law in reviewing discretionary rulings – in other words *de novo* review. Not only does this make no sense, but contrary to what Shekoyan suggests, the Circuit Court of Appeals did not simply rubber stamp the district court's discretionary case management rulings refusing to allow him to file a summary judgment motion nearly one year after the deadline for dispositive motions, denying his Rule 11 motion arising out of improper submissions by his own lawyer, and declining to retain supplemental jurisdiction over non-federal claims.

III. THE LOWER COURTS' TITLE VII RULINGS ARE CONSISTENT WITH THE ESTABLISHED CASE LAW AND RAISE NO LEGAL ISSUES THIS COURT NEEDS TO DECIDE

A. Title VII Applies Extraterritorially Only To United States Citizens, And Petitioner Was Not A United States Citizen When He Worked For Respondent In The Republic Of Georgia

In *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 248-59 (1991) (*Arabian Am. Oil*), this Court ruled Title VII applied only domestically, to American citizens and aliens working within the United States and specified American territories. *See also Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95 (1973) (holding Title VII applies to aliens working in the United States). The Court grounded its holding on

the longstanding presumption against extraterritorial application of federal law in the absence of "clearly expressed" congressional intent to the contrary. 499 U.S. at 248. The Court pointed out Congress both was aware of the presumption against extraterritorial application of federal law and the necessity of speaking definitively on the issue if it intends extraterritorial reach. For example, in reaction to cases holding the Age Discrimination in Employment Act [29 U.S.C. § 630] ("ADEA") did not apply extraterritorially, Congress had amended that Act to make it "'apply to citizens of the United States employed in foreign countries by U.S. corporations or their subsidiaries.'" 499 U.S. at 258. The Court invited Congress to take the same action with respect to Title VII. *Id.*

Congress quickly accepted the invitation and amended Title VII (and the Americans with Disabilities Act [42 U.S.C. §§ 12111 *et seq.*] ("ADA")) expressly to give the statute limited extraterritorial reach. 42 U.S.C. §§ 2000e(f), 2000e-1(c). In fact, Congress used nearly the same language it had used in amending the ADEA. Thus, Title VII's definition of "employee" now provides: "With respect to employment in a foreign country, such term [employee] includes an individual *who is a citizen of the United States*." 42 U.S.C. § 2000e(f) (emphasis added); *compare* 29 U.S.C. § 630(f) (ADEA) ("The term 'employee' includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.").[7]

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[7] Other provisions of Title VII now cover foreign corporations "controlled" by an "employer" and provide that any practice prohibited under Title VII committed by such a "controlled" foreign corporation "shall be presumed to be engaged in" by the controlling "employer." Conversely, the statute does not apply to "foreign operations" of a

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"Together, these sections establish that Title VII applies abroad only when (1) the employee is a citizen of the United States and (2) the corporation is controlled by an American employer." *Iwata v. Stryker Corp.*, 59 F. Supp. 600, 604 (N.D. Tex. 1999); *accord Torrico v. Int'l Bus. Machs. Corp.*, 213 F. Supp. 2d 390, 399 (S.D.N.Y. 2002) ("*Torrico I*") ("it is clear that [the 1991 amendments to Title VII] distinguish between U.S. citizens working abroad for U.S. employers, who are protected from discrimination, and non-U.S. citizens working abroad for those same employers, who fall outside the statutory protections against discrimination"); *Russell v. Midwest-Werner & Pfleiderer, Inc.*, 955 F. Supp. 114, 115 (D. Kan. 1997) ("The general rule is that with respect to foreign employment, Title VII applies only to American citizens employed abroad by American companies or their foreign subsidiaries.").[8] Or, stated another way, extraterritorially, Title VII does not apply to non-citizens. *See Mousa v. Lauda Air Luftfahrt, A.G.*, 258 F. Supp. 2d 1329, 1337 (S.D. Fla. 2003) ("If the definition of "employee" [in Title VII] included all individuals working abroad, there would be no reason for Congress to expressly include United

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"foreign person not controlled by an American employer." 42 U.S.C. § 2000e-1(c). In addition, § 2000e-1(a) continues to state: "This subchapter shall not apply to an employer with respect to the employment of aliens outside any State. . . ." *Id.* § 2000e-1(a).

[8] *See also Reyes-Gaona*, 250 F.3d 861, 865 (4th Cir. 2001) (applying similar ADEA language: Congress amended ADEA "to give it limited extraterritorial application"); *Hu v. Skadden, Arps, Slate, Meagher & Flom LLP*, 76 F. Supp. 2d 476, 477 (S.D.N.Y. 1999) (applying similar ADEA language: "The extent to which the ADEA applies outside of the United States is clearly limited."); *Denty v. SmithKline Beecham Corp.*, 907 F. Supp. 879, 883 (E.D. Pa. 1995) (applying similar ADEA language: "the ADEA applies abroad only when (1) the employee is an American citizen and (2) the employer is controlled by an American employer").

States citizens."); *Russell*, 955 F. Supp. at 115 ("Unless an American citizen, a person employed abroad is not an 'employee' under Title VII.").[9]

As this Court has stated many times, "when the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms." *Lamie v. United States*, 540 U.S. 526, 534 (2004). Furthermore, because the issue here concerns the extraterritorial reach of a statute, the operative presumption is against such application unless Congress has "clearly expressed" otherwise. *Arabian Am. Oil*, 499 U.S. at 248. It also must be assumed Congress acted with full knowledge of both this presumption and its obligation to be explicit when it intends federal law to apply to conduct within foreign borders. *Id.* at 248, 258-59. Thus, had Congress intended that Title VII also extend to *non*-citizens working in foreign countries, it not only could have said so, but was required to do so. *See Reyes-Gaona*, 250 F.3d at 865 (discussing similar ADEA language).[10]

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[9] *See also Hu*, 76 F. Supp. 2d at 478 (applying similar ADEA language: "the rules for extraterritorial application require a distinction between citizens and non-citizens of the United States"); *O'Loughlin v. The Pritchard Corp.*, 972 F. Supp. 1352, 1364 (D. Kan. 1997) (applying similar ADEA language: "Such specific inclusion [of citizen of the United States] leads to a reasonable negative inference that Congress intended to exclude from the definition of 'employee' non-citizens of the United States employed by an employer in a workplace in a foreign country.").

[10] In fact, in other statutes, Congress expressly has provided that they apply both to "citizens" and other classes of residents. *E.g.*, 22 U.S.C. § 2755 and 26 U.S.C. § 7701(a)(30)(A) (Arms Control Export Act: prohibiting discrimination against any United States person and defining such individuals as "a citizen or resident of the United States"); 5 U.S.C. § 5561 (Government Organization and Employees

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Shekoyan's insistence that the Court's decision in *Spector v. Norwegian Cruise Line Ltd.*, ___ U.S. ___, 125 S.Ct. 2169 (2005), has dispensed with the presumption against extraterritorial application and compels the extension of Title VII to the foreign employment of non-citizens, is wholly unfounded. In *Spector*, the Court ruled Title III of the ADA generally applies to foreign registered cruise ships operating in United States waters. As the Court discussed, for nearly a century, it has held general statutes presumptively applied to conduct on foreign registered vessels operating in United States territory, except when the internal interests of the ship are at stake. *Id.* at 2177. Accordingly, while the Court ruled the ADA generally applied to such ships, it also recognized that some Title III accommodation requirements might implicate internal ship interests. It therefore discussed at some length how courts should determine when internal ship interests exception would apply. *Id.* at 2179-84. The facts and issues in this case are not remotely similar. Nor did the Court in *Spector* even suggest it was overruling the presumption against extraterritorial application of Title VII it articulated in *Arabian Am. Oil.*

Even if the legislative history were considered, it confirms what is explicit on the face of the statute – that Congress meant what it said by using the terminology "citizen of the United States." While the amendment

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Act: defining employees as "an employee in or under an agency who is a citizen or national of the United States or an alien admitted to the United States for permanent residence"). Congress chose not to include such language in Title VII, and it is the obligation of the courts to apply the statute as written, as all courts applying this provision of Title VII, including the lower courts here, have done.

adding this language to Title VII appears to have been included in the Civil Rights Act of 1991 without discussion, there is discussion of this language in the legislative history of the amendment adding it to the ADEA. Since the language is the same and was added to both statutes for the same reason – to overcome the presumption against extraterritorial application – the legislative history of the amendment to the ADEA provides insight into the amendment of Title VII. *Torrico I*, 213 F. Supp. 2d at 399.[11] This legislative history states in pertinent part:

> The purpose behind the amendment is to insure that the citizens of the United States who are employed in a foreign workplace by U.S. corporations or their subsidiaries enjoy the protections of the [ADEA]. When considering this amendment, the Committee was cognizant of the well-established principle of sovereignty, that no nation has the right to impose its labor standards on another country. That is why the amendment is *carefully worded to apply only to citizens of the United States* who are working for U.S. corporations or their subsidiaries. It does not apply to foreign nationals working for such corporations in a foreign workplace and does not apply to foreign companies which are not controlled by U.S. firms. S. Rep. No. 98-467, at 27-28 (1984), *reprinted* in 1984 U.S.C.C.A.N. 2974, 3000-01 (emphasis added).

Nevertheless, Shekoyan claims the time has come for the courts to judicially rewrite Title VII's explicit "citizen

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[11] This is particularly true since the Court expressly invited Congress to add to Title VII the language it had added to the ADEA. *Arabian Am. Oil*, 499 U.S. at 259.

of the United States" language to also include "non-citizen, nationals of the United States." However, this is not a request that can properly be made to this Court. *See Arabian Am. Oil*, 499 U.S. at 259 (leaving it to Congress to "calibrate" the extraterritorial reach of Title VII). While Shekoyan complains applying Title VII according to its plain terms leaves him and other claimed non-citizen "nationals" without recourse for allegedly wrongful conduct and that American companies employing legal residents overseas should not be able to "selectively escape" federal anti-discrimination laws, these are arguments that must be directed to Congress.[12]

Shekoyan argues there was no possibility of interference with foreign laws in his case because he had moved to the United States, intended to become a citizen and had spiritually committed his allegiance to the United States. However, that may not be the case as to every non-citizen, legal resident. It is therefore no surprise that in the two decades since this language was added first to the ADEA, and then to Title VII and the ADA, Congress has made no attempt to change it in the face of repeated statements by the courts that this language means what it says and that these statues apply extraterritorially only to United States citizens.

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[12] Indeed, for years the courts – including this Court – held Title VII and the ADEA did not apply at all to extraterritorial employment (even that of United States citizens) in the absence of express statutory language, despite the argument this left aggrieved American citizens without a remedy. *E.g., Arabian Am. Oil*, 499 U.S. at 259 (Title VII); *Ralis v. RFE/RL, Inc.*, 770 F.2d 1121, 1124 (D.C. Cir. 1985) ("For reasons that are shrouded in mystery, Congress saw fit to limit the ADEA's compass for many years to the territorial confines of the United States.").

Furthermore, the record in this case demonstrates the wisdom of Congress' choice to draw a clear line so employees, employers and the courts can readily discern what rights are provided and obligations imposed under this law. Shekoyan claims to have been a "United States national" and thus entitled to invoke Title VII. But he certainly did not qualify as a "United States national" under established immigration law. As a leading immigration law treatise explains:

> The term nationals came into use in this country when the United States acquired territories outside its continental limits whose inhabitants were not at first given full political equality with citizens. Yet, they were deemed to owe permanent allegiance to the United States and were entitled to our country's protection. The term national was used to include these non-citizens in the larger group of persons who belonged to the national community and were not regarded as aliens. 3 Gordon & Rosenfield, *Immigration Law and Procedure*, § 11.3b, at 11-8 (1975); *accord Rabang v. INS*, 35 F.3d 1449, 1452 n.5 (9th Cir. 1994).

Consistent with this view, the Immigration and Nationality Act now defines a "national of the United States [as] (A) a citizen of the United States, or (B) a person, who, though not a citizen of the United States, owes permanent allegiance to the United States." 8 U.S.C. § 1101(a)(22). The case law, in turn, consistently has construed subsection (B), pertaining to non-citizens, as applying to only a very limited category of persons. *E.g.*, *Oliver v. United States Dep't of Justice*, 517 F.2d 426, 427-28 (2d Cir. 1975) (holding Canadian citizen who was a twenty-year, permanent resident of the United States and

married to an American citizen was not a national because she had failed to begin the naturalization process and therefore was deemed to still owe allegiance to her native country); *Carreon-Hernandez v. Levi*, 543 F.2d 637, 637-38 (8th Cir. 1976) (holding Mexican citizen who was a twenty-year resident of the United States, married to an American citizen, and living "an exemplary life, working, paying taxes, registering for the Selective Service, etc." was not a national because he had "never applied for United States citizenship"); *Hughes v. Ashcroft*, 255 F.3d 752, 756-57 (9th Cir. 2001) (holding individual born outside the United States, or one of its territories, must, at a minimum, demonstrate that he or she had applied for United States citizenship in order to be a "national").

Thus, at a minimum, to qualify as a "United States national" under immigration law, a non-citizen resident must have applied to become a United States citizen. Shekoyan was not even eligible to apply to become a citizen at the time he worked for Sibley in the Republic of Georgia because he had not yet lived in the United States for the requisite five-year period. *No* immigration law even remotely suggests legal residency, alone – and that is *all* Shekoyan had at the time – suffices to qualify as a "United States national."

Therefore, Shekoyan never has relied on immigration law to support his claimed "U.S. national" status. Rather, he claims to have been a "United States national" because Sibley classified him in its contract with USAID as a "United States expatriate." He further points out that a regulation pertaining to the contracting authority of USAID defines "U.S. national (USN)" as "an individual who is a U.S. citizen or a non-U.S. citizen lawfully admitted for permanent residence in the United States." 48

C.F.R. 702.170-16. These contracting provisions, pertaining to wage and procurement issues [App. 481-87, 523, 559, 602, 634, 1865], had no bearing on Shekoyan's or any other employee's immigration status.[13] In any case, that Shekoyan must resort to a contract provision and a regulation having nothing to do with immigration law to support his claim that he was a "United States national," demonstrates the peril of going down the road he has urged the courts to trod. The lower courts correctly declined to do so.[14]

B. Petitioner Was Not Working "In" The United States When He Worked For Respondent In The Republic Of Georgia

Relying on the Court's holding in *Espinoza*, 414 U.S. at 95, that Title VII applies to aliens employed in the United States, Shekoyan alternatively argues Title VII applied because he worked "within" the United States. In this regard, he claims he was hired in the United States, complained to Sibley personnel located in the United States about Reynold's alleged misconduct in the Republic of Georgia, and decisions about his employment status were made and/or approved by Sibley personnel located in the United States. There is no dispute, however, that

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[13] Thus, while Shekoyan repeatedly claims Sibley "admitted" he was a "United States national," it *never* made any such admission as to his *immigration* status and agreed only that he was classified as a "United States expatriate" in its contract with USAID [Rec. 481-85] and a "U.S. National" under USAID's acquisition regulations [App.Ex. 333]. (*See also* Rec. 977, 1849 n.3)

[14] As discussed, *supra* at 4, the lower courts also correctly rejected Shekoyan's claim he was a "U.S. diplomat" and therefore should be deemed to have been working on "U.S. soil."

Shekoyan's job was in the Republic of Georgia, and he lived in and went to work every day in that Eastern European country.

Again, the case law on the locale of employment for purposes of the extraterritorial application of Title VII is well established, as reflected by the lower courts' decisions here. Generally, the focus is on the location of the employee's workstation – the place where he or she reports to work on a regular basis. *Pfeiffer v. Wm. Wrigley Jr. Co.*, 755 F.2d 554, 555, 559 (7th Cir. 1985) (executive hired in the United States but assigned for extended period of time overseas was employed extraterritorially).[15] Accordingly, the courts uniformly have rejected the same kinds of arguments Shekoyan makes based on peripheral connections with the United States. *E.g.*, *Hu*, 76 F. Supp. 2d at 477-78 (fact plaintiff conducted his job search in the United States and international law firm made hiring decision in the United States did not alter fact plaintiff applied for job located in Hong Kong); *O'Loughlin*, 972 F. Supp. at 1357, 1366 (fact plaintiff worked initially in United States, was assigned to and then returned from an extraterritorial position, did not bring his extended overseas employment within statute); *Wolf*, 617 F. Supp. at 861-63 (occasional business trips to United States did not mean plaintiff's employment was in two locales, and "plaintiff's allegation that he was supervised and controlled by top management of the defendants based in the

[15] *See also Denty*, 109 F.3d at 150 (locale of job under ADEA is place where regular job duties are performed); *Wolf v. J.I. Case Co.*, 617 F. Supp. 858, 861 (E.D. Wis. 1985) ("the key factor" in determining the extraterritorial applicability of the ADEA "is the employee's 'relevant work station' ").

United States is not of any legal significance so long as the plaintiff performed his work abroad").

Nor did the lower courts improperly overlook *Torrico I*, 213 F. Supp. 2d at 390, as Shekoyan claims. Not only did the *Torrico I* Court explain the case before it involved an unusual set of circumstances [*id.* at 401], but it subsequently contrasted those unusual circumstances with Shekoyan's more run-of-the-mill circumstances. *Torrico v. Int'l Bus. Machs., Inc.*, 319 F. Supp. 2d 390, 405 (S.D.N.Y. 2004) ("*Torrico II*") (*Shekoyan* "is not materially different" from the other cases employing the workstation approach).[16]

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[16] In *Torrico*, the plaintiff worked for his American employer for six years, and his employment agreement expressly stated international assignments were temporary and that, upon return, a domestic division of the company would arrange for his subsequent domestic position. *Id.* at 393. When he was temporarily assigned to Chile, his job duties remained exactly the same, he reported directly to a domestic division and made regular business trips to New York. *Id.* The court contrasted this with other cases in which the employees were "hired to work exclusively (or almost exclusively) in foreign workplaces." *Id.* at 401, 405. Given the circumstances, the *Torrico I* Court used what it called a "center of gravity" analysis and concluded the plaintiff had alleged sufficient facts to avoid a motion to dismiss. *Id.* at 405-06. In contrast, Shekoyan had never before worked for Sibley. His employment contract did not state the assignment to the Republic of Georgia was "temporary." Nor did it state he would subsequently be reassigned by a domestic division to a domestic position. Because his job in the Republic of Georgia was the only position he ever held with Sibley, his duties were not the same as any prior domestic position. He was directly supervised by personnel located in Georgia. And he only traveled to the United States one or two times for personal vacations. Thus, as the *Torrico* Court observed, Shekoyan's employment was no different than that in all of the other cases utilizing the "workstation" approach and focusing on the locale of the employee's day to day work.

In sum, the lower courts' rejection of Shekoyan's Title VII claim is consistent with all other case authority addressing the salient issues, and there is no reason for this Court to take up this case.

IV. THE LOWER COURTS' AFFIRMANCE OF SUMMARY JUDGMENT ON PETITIONER'S FCA CLAIM ALSO IS CONSISTENT WITH THE ESTABLISHED CASE LAW AND RAISES NO LEGAL ISSUE THIS COURT NEEDS TO DECIDE

In the Court of Appeals, Shekoyan made only a cursory argument challenging the grant of summary judgment on his FCA "whistle-blower" claim (barely three pages, in contrast to the 37-pages he devoted to Title VII). Moreover, the thrust of his argument was that the district court's grant of summary judgment was "inconsistent" with the court's prior denial of Sibley's 12(b)(6) motion to dismiss. (Pet. AOB 46-48) Of course, there was nothing "inconsistent" in the rulings, and summary judgment was properly granted after discovery was undertaken and undisputed evidence established he could not prevail on a FCA claim.

Contrary to what Shekoyan now suggests, the lower courts did not formulate any new legal standard for evaluating his "whistle-blower" claim. Rather, the courts employed the established legal framework articulated by the Circuit Court in *United States ex rel. Yesudian v. Howard Univ.*, 153 F.3d 731, 736 (D.C. Cir. 1998), and followed in other circuits. And evaluated within this framework, the facts do not support a viable claim.

As the lower courts recognized, not every question raised or concern expressed by an employee can later be used as the basis for a "whistle-blower" claim. "Protected

activity" must relate to "exposing fraud" or "involvement with a false claims disclosure." *McKenzie v. BellSouth Telecomm.*, 219 F.3d 508, 515 (6th Cir. 2000). For example, in *Hutchins v. Wilentz, Goldman & Spitzer*, 253 F.3d 176 (3d Cir. 2001), a law firm partner asked the plaintiff paralegal to "investigate certain client bills, with particular attention to the 'high cost' of certain computerized legal research." *Id.* at 179-80. The plaintiff did so and prepared a memorandum detailing his concerns about the firm's billing practices. *Id.* He was subsequently terminated because the firm suspected he had authored a disparaging memo circulated by another paralegal. *Id.* at 181. The Third Circuit affirmed summary judgment on his "whistle-blowing" claim. The plaintiff "never threatened to report his discovery . . . to a governmental authority, nor did he file a False Claims Act suit until after he was terminated." *Id.* at 193. He never told his supervisors he believed the billing was "illegal" or that it was "fraudulent." *Id.*; *see also McKenzie*, 219 F. 3d at 516-17 (the "in furtherance" requirement requires "more than merely reporting wrongdoing to supervisors").

Thus, "[m]ere dissatisfaction with one's treatment on the job is not, of course, enough. Nor is an employee's investigation of nothing more than his employer's non-compliance with federal or state regulations." *Yesudian*, 153 F. 3d at 740; *see also Brandon v. Anesthesia & Pain Mgmt. Assocs., Ltd.*, 277 F.3d 936, 944 (7th Cir. 2002) (plaintiff failed to establish a "whistle-blowing" claim where he told shareholders he was concerned about their company's Medicare billing practices to try "to convince" them to comply with regulations); *United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1523 (10th Cir. 1996) (plaintiff did not establish a claim where

she "regularly communicated" to her superiors information about non-compliance with Medicare billing practices, but "never suggested" she intended to report the noncompliance to the government or gave "any indication" she intended to pursue it further for purposes of a *qui tam* action; rather, concerns she raised were within the scope of her job duties and thus failed to put employer on notice she was acting "in furtherance" of a False Claims Act action).

As the lower courts here explained, Shekoyan's own deposition testimony demonstrated he had not engaged in conduct meeting the "in furtherance" requirement. While Shekoyan claims he raised questions about several matters [Rec. 591-92, 885-95], he admitted he did not know whether there actually were any problems and he raised the questions so Sibley could look into them [Rec. 589-94, 893-95]. Shekoyan also was adamant that he *never* believed Sibley had engaged in fraudulent conduct.[17] (Rec. 595-96)

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[17] For example, Shekoyan testified in deposition that after he spoke with Gary Vanderhoof, Sibley's vice-president at the time, about the fact two branch heads of the Georgian Federation of Professional Accountants and Auditors ("GFPAA") – a recipient of GEAR project funds – appeared to have other full time employment, as well, and why their salaries were not being reported in full, Vanderhoof told him, "don't make too much noise. Let us finish this [contract] extension [with USAID] . . . and then we will deal with whatever issues you have to deal with." (Rec. 594) When asked whether he was concerned enough that he "made noise" about "stealing money," Shekoyan answered: "This is your conclusion. What I thought was that something inappropriate is taking place. We have to either shed light on it to find out what's really going on. . . . " (Rec. 595) When pressed again as to "when" he concluded Sibley was involved in any "corruption," Shekoyan again denied ever coming to such a conclusion: "Absolutely no. I do not agree with this statement. I have never concluded that there was corruption. I thought

(Continued on following page)

"An employer is entitled to treat a suggestion for improvement as what it purports to be rather than as a precursor to litigation." *Luckey v. Baxter Healthcare Corp.*, 183 F.3d 730, 733 (7th Cir. 1999); *see also Hutchins*, 253 F.3d at 193 (in complaining to supervisor about billing practices, plaintiff "'merely informed a supervisor of a problem and sought confirmation that a correction was made'" (*quoting Zahodnick v. Int'l Bus. Machs. Corp.*, 135 F.3d 911, 914 (4th Cir. 1997)); *McKenzie*, 219 F.3d at 516 (internal reports seeking to have employer comply with federal or state regulations are not conduct "in furtherance of" a False Claims Act action); *Robertson v. Bell Helicopter Textron, Inc.*, 32 F.3d 948, 951-52 (5th Cir. 1994) (plaintiff never gave employer any indication he was raising concerns as part of a fraud investigation that could lead to legal action).

The lower courts properly concluded the most the admissible evidence showed was that Shekoyan raised questions that Sibley was entitled to take at face value – inquiries by an employee who wanted to alert the company to issues that bore further examination so it could make sure it was following applicable rules and regulations. There was *nothing* in either the substance of Shekoyan's inquiries or the way in which they were made that put Sibley on notice he was engaged in conduct "in furtherance" of a False Claims Act action. Accordingly, there is no reason for this Court to revisit the lower courts' application of the established law to the particular record in this case.

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that there were some issues that need to be addressed or corrected or fixed or I don't know, worked out, but I did not conclude that there was a corruption." (Rec. 596)

V. THE CIRCUIT COURT OF APPEALS HAD A FIRM GRASP OF THE ABUSE OF DISCRETION STANDARD

Shekoyan's claim that the Court should grant his petition to expound on the abuse of discretion standard scarcely merits response. The district court acted well within its discretion in refusing to allow him to file a belated motion for summary judgment nine months after discovery closed and the deadline for filing dispositive motions had passed. (App. 1151-52) In addition, while Shekoyan claims his belated motion was based on "new" evidence, the supposedly newly obtained declaration from George Adamia did not "add" anything new for purposes of summary judgment. Shekoyan, himself, characterized the declaration as simply "corroborating" his own claims. (App. 898) Finally, in addition to its other defenses, Sibley disputed Shekoyan's claims of alleged misconduct. (App. 196-203) Accordingly, Shekoyan could not possibly have prevailed on a motion for summary judgment.

The district court also acted well within its discretion in denying his Rule 11 motion for sanctions. Shekoyan's submission of an unnotorized declaration of his attorney purporting to recount the substance of telephone interviews with two former Sibley employees and a "draft," unsigned declaration one of these former employees supposedly had agreed to sign triggered two motions. Sibley moved to strike the improper submissions [Rec. 1326-59, 1360-74], and in conjunction with that motion filed sworn and signed declarations by both individuals stating Shekoyan's lawyer had made a number of misrepresentations in her proffered declaration [Rec. 1361-71]. Shekoyan countered with a Rule 11 motion for sanctions for a litany of perceived wrongs and slights, including

Sibley's failure to notify opposing counsel prior to filing the motion to strike as required by local rule, for bringing a "frivolous" motion to strike and for filing a "frivolous" counter-claim. (Rec. 1978-2031)

In a 15-page order, the district court chronicled each of the parties' contentions and granted in part Sibley's motion to strike, instructed all parties to abide by court rules in the future, and denied Shekoyan's Rule 11 motion for sanctions. (App. 1152-69) The district court acted well within its discretion in this even-handed handling of the parties' string of accusations of improper and bad faith conduct. While Shekoyan complains the court denied his Rule 11 motion without bothering to listen to the tape he submitted to support his claim that one of the declarations submitted by Sibley was "perjured," what the district court did was "refuse" to sort out the cross-accusations and, instead, ruled Shekoyan could use the tape at trial to impeach the witness [App. 1167] – again, a ruling well within the court's discretion.

CONCLUSION

Not only are the questions proffered by Petitioner a step beyond what the record will fairly support, but not one warrants the attention of this Court. The petition for writ of certiorari should be denied.

DATED January 11, 2006.

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